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IN THE
Supreme Court of the United States

OCTOBER TERM, 1964

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FIBREBOARD PAPER PRODUCTS CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia

BRIEF FOR THE CHAMBER OF COMMERCE OF THE
UNITED STATES AS AMICUS CURIAE

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No. 610

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE
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I. INTRODUCTION

The Chamber of Commerce submits this brief as amicus curiae because of the concern of its membership in this matter. Permission to file a brief was granted by the parties pursuant to Rule 42(2) of the Rules of the Supreme Court.

The Chamber of Commerce of the United States is a federation, consisting of a membership of over 3,900 na-

tional, local and state chambers of commerce and trade associations, with an underlying membership of approximately 1,700,000 business firms and a direct membership in excess of 19,400 business firms. Many members are engaged in interstate commerce or in activities which affect interstate commerce and are, therefore, subject to federal laws that affect the employer-employee relationship.

II. STATEMENT OF THE CASE

This case arose out of a decision by the National Labor Relations Board (referred to herein as "the Board") which had sustained a complaint alleging that the Petitioner (referred to herein as "the Employer") had refused to bargain in violation of Section 8(a)(5) of the National Labor Relations Act (referred to herein as "the Act")¹

Stated briefly, the alleged violation occurred when the Employer decided during the normal conduct of his business that he could save over \$200,000 a year by having another company perform his maintenance work. When Local 1304 of the United Steelworkers, the bargaining representative of the maintenance employees, was notified of this decision, it filed a charge of a refusal to bargain against the Employer. A complaint was then issued by the Board's General Counsel alleging a violation of Section 8(a)(5) on the ground that the Employer had not bargained with the Steelworkers concerning his decision to contract out the maintenance work. The Trial Examiner which heard the case recommended to the Board that the complaint be dismissed because the Employer's decision was not discriminatorily motivated. The Board, with one member dissenting, adopted the Trial Examiner's

¹ The relevant provisions of the Act concerning the duty to bargain are contained in the Appendix.

recommendation and dismissed the complaint. *Fibreboard Paper Products Corporation*, 130 NLRB 1558 (1961).

Subsequently, after two new members were appointed, the Board reconsidered its decision, reversed itself, and, with one member dissenting, found that the Employer's failure to negotiate with the union concerning his decision to contract out the maintenance work constituted a violation of Section 8(a) (5) of the Act.

To remedy the alleged violation, the Board ordered the Employer to abrogate its agreement to contract out work, reinstitute the maintenance operation, reinstate the employees with back pay, and bargain with the union before making any changes with respect to contracting out. *Fibreboard Paper Products Corporation*, 138 NLRB 550 (1962).

The Court of Appeals for the District of Columbia affirmed the Board on the ground that contracting out is a required subject for bargaining. *Fibreboard Paper Products Corporation v. NLRB*, 322 F. 2d 411 (C.A. D.C.).

III. ARGUMENT

Fibreboard Doctrine Will Drastically Affect Future Management-Labor Relationships

The ultimate effect of the *Fibreboard* decision and the trend of Board decisions, is to make almost any intended operational change by an employer a required subject for bargaining and co-determination with the union.

Indeed, the Board has already required bargaining about business expansion, automation, discontinuance of business, selling a business and transferring work from one plant to another.²

² See: *W. L. Rives Company*, 136 NLRB 1050 (1962); *Renton News Record*, 136 NLRB 1294 (1962); *Star Baby*

If this Court sustains the Board's decision in the *Fibreboard* case, the results of this new doctrine can lead to greater industrial strife than has been experienced since the close of World War II.

It would also mean that an employer is not only strictly limited with respect to contracting out, but he also cannot make any change or decision concerning his business without first obtaining the union's consent. Thus, an employer's freedom to operate is impaired irrespective of the reason or need for the change, or the loss which may be incurred because of delay in putting the change into effect.

A number of hypothetical cases are worthy of consideration.

Hypothetical Case No. 1: Let us suppose a company has an opportunity to buy a new and better machine. Decisions to do so are being made daily by employers throughout the country. These decisions have been made unilaterally by management throughout the history of our

Company, 140 NLRB No. 67 (1963); *Weingarten Food Center of Tenn., Inc.*, 140 NLRB No. 25 (1962).

One of the Board's trial examiner's has justified these Board's decisions on the ground that the relationship between an employer and a union "is like a marriage."

"But we can well imagine the almost universal cry in every home in the land should the husband, without first talking it over with his wife, rent out the spare room in the home to a lovely young roomer, be she blonde, brunet or red head! The same thing is true, with perhaps a difference in degree, should the husband just sell his wife's beloved fur coat! These things just cannot be done if the marriage is to be kept going. The public interest in labor-management relations is to keep the parties together." *Jersey Farm Milk Service, Inc.*, TXD-520-63, dated November 15, 1963.

country. This includes the time that has elapsed since the Wagner Act was enacted.

Buying and installing a machine is not "wages, hours, or other terms and conditions of employment."³ Literally the Act does not provide that the employer must bargain about it.

But suppose that buying the machine will create a situation in which the employer will be able to reduce his labor force from 50 to 35 employees. Without doubt, this reduction in force affects the employees' "conditions of employment." According to the Board, the employer is obligated to bargain. The bargaining may relate to whether the machine will be purchased in the first place; whether the new machine is to be operated by 50 employees or by 35; how many hours a week they will work; whether the hourly rate will be adjusted to maintain weekly earnings; whether there will be severance pay if the number of employees is reduced; and the allocation of available jobs and job classifications among the employees.

In short, it is the Board's view that the decision to purchase a new machine is to be a joint decision, arrived at by the company and the union through collective bargaining.

Hypothetical Case No. 2: But let us now suppose that the employer's decision is not whether to buy a modern machine as a replacement, but is a decision as to the design of next year's product model.

For example, a manufacturer of home appliances decides to eliminate bright molding used in his last year's models. Most of his employees are within a bargaining unit represented by one union, but those who polish the molding are within a bargaining unit represented by a second union. Thus, if the molding is eliminated the em-

³ See the Appendix concerning the duty to bargain.